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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1959

No.

METROPOLITAN STEVEDORE COMPANY,
a Corporation,

Petitioner,

vs.

DAMPSKIBSAKTIESELSKABET INTERNATIONAL,
a Corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

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PETITION FOR WRIT OF CERTIORARI
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for the Ninth Circuit.

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit affirming a judgment for damages against Petitioner.

OPINIONS BELOW.

The opinion of the United States District Court for the Southern District of California appears in 170 F. Supp. 603. The opinion of the United States Court of Appeals is not yet reported.

JURISDICTION.

The judgment of the Court of Appeals was rendered and entered January 10, 1960. 28 U.S. Code §1254 confers jurisdiction on this Court.

QUESTION PRESENTED.

In an action for indemnity against a stevedore employer is a ship entitled to recover damages paid to a longshoreman for his personal injuries resulting from a defective condition for which the ship was solely responsible when prior to the injury the stevedore employer suspended operations because of the defective condition and only resumed operations after instructions from the ship.

STATEMENT.

Roy Hugev, a longshoreman employed by Petitioner was injured while aboard the M. S. CASTLEVILLE then in navigable waters. He commenced action for personal injuries in the Superior Court in and for the State of California under "saving to suitors" clause (28 USC §1333(1)). Dampskisaktieselskabet

International, a corporation (hereafter "Dampsk"), a Norwegian corporation, owner of the vessel, removed to the United States District Court because of diversity (28 USC §1442). Dampsk then filed a third party complaint against Petitioner seeking indemnity, alleging that Petitioner "failed to notify third party plaintiff of such unseaworthiness . . . or to suspend stevedoring operations until such conditions . . . could be remedied and corrected" (R. 5). Petitioner generally denied these charging allegations asserting that there was no obligation to indemnify; its sole liability was under the Longshoremen's & Harbor Workers' Act (33 USC §901 et seq.) (R. 11-16).

Previous to trial Dampsk stipulated that the CASTLEVILLE was unseaworthy and it was liable to Hugev for $2,000.00 damages (R. 28). (The evidence is uncontradicted that Petitioner did not cause the unseaworthy condition; that Petitioner stopped work to permit correction of the defective condition.) Dampsk requested judgment based on this stipulation (R. 25-26), which request was granted. Thereafter, the third party action was tried without a jury, Dampsk calling Hugev as its sole witness.

Prior to injury Hugev, in company with the other longshoremen in his gang, was directed to discharge baled rubber (loaded in the Far East) from the forward part of the square of the hatch at the 'tween deck level of the No. 1 hold of the CASTLEVILLE (R. 33).

Baled rubber was on this forward section where Hugev was working and the next section aft and in

the wings about these sections (R. 68); rattan furniture was in the wings aft of the second section and was being worked concurrently by another gang (R. 76) with the after lifting gear.

In order to discharge the rubber it was first necessary to clear the forward section of the square of the hatch (R. 54). Hugev's gang started on this forward section. When the longshoremen worked down to the bottom of the piles of rubber and had cleared about two-thirds of this section (R. 44) the hatch boards were found to be "rocky" or "wobbly"; the boards tilted like a seesaw (R. 36-37); when the boards came down, they missed the lip. When this condition was discovered, Petitioner's ship foreman, Short, ordered work stopped and complained to the second mate (R. 60-61). The mate and Short went into the hold below; the mate discovered the wrong queen beam was in place; the mate said to Short (R. 62):

> "He told me to clear the rubber in the forward square, take the hatch boards off and change that beam. He said that was the top deck beam. It was the main deck beam. He said, 'Change it and put the beam that is supposed to go in there.' He says, 'It's been mixed up in the Far East.'"

Short then (R. 62):

> "... told the hold men what the mate had said, that we would have to clear that forward section and change that beam, get that beam out and take the hatch boards off and get that beam out and put the proper beam in its place, and then continue working. But we had to clear the rubber, clear that section. And I told them to watch

themselves; whatever they did, to watch themselves and be careful."

In order to remove the rubber preparatory to correcting the defective condition, the bales had to be loaded onto a pallet, or lift board which lift board had to be positioned on the square of the hatch (R. 47, 66) so as to be under the boom for the lift; in order to do the work, the longshoremen had to walk on the rocky hatch boards (R. 70, 77, 78).

Despite Hugev's use of precautions after Short's warning (R. 45), Hugev fell. Hugev had hooked on the load preparatory to its being lifted out and was walking clear when a board gave way (R. 33).

Metropolitan was performing stevedore services pursuant to a written contract which contained no express provision for indemnity.

Judgment of indemnity was ordered in favor of Dampsk and against Petitioner for the reasons mentioned in the District Court Opinion.

The Court of Appeals affirmed.

REASONS FOR GRANTING THE WRIT.

There is no need to refer to the revolution effected by this Court in the legal principles applicable to injuries to maritime workers (see *Seas Shipping Co. v. Sieracki* (1946), 328 U.S. 85; *Pope & Talbot, Inc. v. Hawn* (1953), 346 U.S. 406). By now the duties owed by ship to maritime worker are substantially crystallized. However, the equally important correla-

tive problem whether ship or stevedore employer should bear the ultimate economic loss remains confused and unresolved (see *Halcyon Lines v. Haenn Ship etc. Corp.* (1952), 342 U.S. 282; *Ryan Stevedoring Co., Inc. v. Pan-Atlantic SS. Corp.* (1956), 350 U.S. 124; *Crumady v. Joachim Hendrik Fisser* (1959) 358 U.S. 423, 3 L. Ed. 2d 413).

It is time to end this confusion. This case in its factual setting provides an ideal judicial vehicle for resolving once and for all (i) whether the employing stevedore is always to insulate the errant shipowner from liability or (ii) whether the ship under certain circumstances must bear the loss even though there may be some fault on the stevedore's part or (iii) whether there should be an apportionment between the two.

Resolution of the question of whose pocketbook shall bear the impact of a longshoreman's injury has pursued a contradictory course. In *Halcyon Lines v. Haenn* (supra) it was held that the errant ship could not recoup. The ship therefore bore the loss. By pursuing a different legal theory (i.e., indemnity for breach of contract) the ship thrust liability on the stevedore in *Ryan*. However, the rationale of *Ryan* was not clear and the lower courts continued to evaluate fault of ship and stevedore based on concepts of negligence (c.f. *American President Lines, Inc. v. Marine Terminals Corp.* (C.A. 9, 1956), 234 F. 2d 753). As a result this Court felt obliged to speak again in *Weyerhaeuser Steamship Co. v. Nacirema Operating Co.* (1958), 355 U.S. 563, pointing out that

"active" versus "passive" or "primary" versus "secondary" concepts of negligence were "inappropriate." At the same time it was stated that where the stevedore's conduct led to the ship's liability the latter "was entitled to indemnity *absent conduct on its part sufficient to preclude recovery*" (p. 567) (emphasis added) citing portions of Corbin, Contracts relating to prevention of contractual performance.

Nacirema certainly said (but by no means spelled out the detail) that there would be circumstances where the fault of the ship would bar it from indemnity. Subsequent decisions (including *Crumady*) have paid attention to the admonition of *Nacirema* concerning the inappropriateness of concepts of negligence but have wholly ignored the other principle announced that fault of the ship may bar indemnity. As a result, the legal significance of the quoted language from *Nacirema* is as cryptic to the maritime industry as a revelation from the Delphic oracle.

The principle enunciated in *Nacirema*, namely, that the ship's fault will bar indemnity when amounting to substantial interference with performance, is an expression of common sense. If this rule is to be more than an empty abstraction, it must not only be founded on but also must be applied with common sense. This principle, which should prevent recovery in many indemnity actions, has been completely emasculated because of judicial uncertainty as to the quantum of fault that will bar recovery. This Court has provided no guides as to *how* the principle of *Nacirema* is to be applied. As a consequence, a purely me-

chanical test of time sequence has been developed (c.f. *Calmar SS. Corp. v. Nacirema Operating Co.* (C.A. 4, 1959), 266 F. 2d 79, 81). Under this test the last actor becomes the legal miscreant and automatically responsible for the damages paid the injured longshoreman. From the nature of things the stevedore is generally the last actor. Although the stevedore may be much less at fault, the ship's misconduct is disregarded and the stevedore pays the bill. If it is the rule that the stevedore is to be liable in every case where his default is subsequent to that of the ship, this Court should so state. If it is not to be the rule and the ship is to have some responsibility, the maritime industry urgently needs to be told what the rule shall be.

With respect to this area of the respective duties of ship and stevedore, there is scant precedent defining the extent of the duty of the shipowner to provide a vessel reasonably suitable for the work to be performed by the stevedore. Heretofore, the focus of the cases has been on the duties owing the ship. There is immediate need to examine the reverse of the coin.

Certainly, common sense tells us that the stevedore cannot be expected to do work on a ship at his peril; the ship must have some obligations in regard to the condition of the vessel.[1] If the fundamental problem

[1]The District Court below (170 F. Supp. 601, 609, 610) apparently felt the contrary is true. The implication of court's reasoning being that once the stevedore comes aboard, defects in the vessel are hazards that the stevedore is paid to encounter and for which the ship has no responsibility. In this regard it is important to note that the defect of the CASTLEVILLE did not result from the elements but someone's default in placing a strongback.

is to be clarified, this basic duty of the ship should be carefully considered here—not only in the light that the stevedore is an expert but also in the light that no one has more intimate expertise concerning a particular vessel than its owner. Further, it should be recognized that the shipowner is not a helpless patient in the hands of the stevedore. From the very nature of things the shipowner exerts enormous economic power over the stevedore who can only offer his services in a sharply competitive industry. The realities of economic life are that the stevedore is in many situations forced to accept defective conditions and to proceed with work under such conditions under the covert threat of economic sanction by the shipowner.

This case should be reviewed for an entirely different reason. The whole principle of saddling the entire financial burden of a longshoreman's injuries on either the ship or the stevedore when both are at fault is unjust; it is inconsistent with deeprooted principles of admiralty tradition of comparative fault (c.f. Tetrault, Seamen, etc., 39 Cornell L.Q. 381; Gilmore & Black, The Law of Admiralty, 374). Apparently the rule of *Halcyon* died because it was felt unfair to load the ship with liability. It is no more fair to throw all the liability on the stevedore, as is now the prevailing rule.

In urging review here it is realized that this Court said in *Halcyon* that it did not wish to fashion new

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The defect must have been Dampsk's responsibility and it should not be able to pass off the loss when the very hazard which caused the Petitioner to quit work resulted in Hugev's injury.

judicial rules of contribution based on comparative fault, awaiting Congressional action. Over eight years have passed since then. Congress has not acted and if past practice is a criterion of the future, it will be a long time (if ever) before this subject receives Congressional consideration.

This Court has said that it would feel free to fashion new rules "if wholly convinced that it would best serve the ends of justice" (*Halcyon*, p. 285). This Court has taken to itself the fashioning of new rules to accomplish justice for the maritime harbor worker (c.f. *Sieracki; Pope & Talbot, Inc. v. Hawn* supra). Unfortunately the underlying problem of fair allocation of economic burden between ship and stevedore employer has not been faced; it has merely been swept under the rug where it remains an untidy lump. Time has come to reappraise whether it is either desirable or just to insulate the shipowner from all financial loss where his fault is a contributing factor in causing a longshoreman's injury. For the sake of justice, a rule of comparative fault should be established in maritime indemnity cases.

Even if the objective of accomplishing a just legal result were not sufficient to require a reconsideration of the rejection of the admiralty rule of comparative fault, pure and simple uniformity in judicial policy requires a reevaluation of the common law philosophy which presently dominates the judicial approach to litigation between ship and stevedore for indemnity. There now exists a sharp inconsistency between the legal rules applicable to a shipowner plaintiff in in-

demnity actions and a maritime worker plaintiff who sues for personal injuries. The latter is not barred by contributory negligence, thanks to the rule fashioned in *Pope & Talbot, Inc. v. Hawn* (supra); such negligence only *mitigates* damages. On the other hand, in indemnity actions the shipowner is permitted to recover his entire loss from the stevedore without regard to the plaintiff shipowner's fault (cf. *Crumady*, supra). No reason can be advanced why the shipowner should enjoy a legal position more favorable than an injured maritime worker. Uniform legal principles should apply in analogous situations. No dramatic revolution in legal rules is required to accomplish this; all that is called for is a logical application of principles of comparative fault already an integral part of admiralty law. Such should be done here.

Dated, San Francisco, California,
April 6, 1960.

Respectfully submitted,
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(Appendices A and B Follow.)

Appendix A

United States District Court
for the Southern District of California
Central Division

Civ. No. 20340-WM

Roy Hugev,
Plaintiff,

vs.

Dampskisaktieselskabet International,
a Corporation,
Defendant.

Dampskisaktieselskabet International,
a Corporation,
Third-Party Plaintiff,

vs.

Metropolitan Stevedore Company,
Third-Party Defendant.

MEMORANDUM OF DECISION

Mathes, District Judge:

Plaintiff commenced this action in the State court under the "saving to suitors" clause [28 U.S.C. §1333(1)] to recover damages for personal injuries alleged to have been sustained on April 19, 1955, as a proximate consequence of unseaworthiness and negligence, while plaintiff was working as a longshoreman engaged in discharging cargo from defendant's M S Castleville docked in navigable waters at the Port of Los Angeles. [*Pope & Talbot v. Hawn*, 346 U.S. 406, 409, 411, 419 (1953); *Williams v. Tidewater Associated Oil Co.*, 227 F.2d 791 (9th Cir. 1955), *cert. denied*, 350 U.S. 960 (1956).]

Defendant shipowner, a Norwegian corporation, filed a timely petition for removal of the case, upon the ground of diversity of citizenship, to the law side of this court. [28 U.S.C. §1442; *Hill v. United Fruit Company*, 149 F.Supp. 470, 472 (S.D.Cal. 1957).]

Following removal, the shipowner filed a third-party complaint against Metropolitan Stevedoring Company, a California corporation, as third-party defendant, alleging *inter alia*: (1) that at the time and place of any injury to plaintiff, third-party defendant was engaged in discharging cargo from the M S Castleville pursuant to a written contract with defendant shipowner; (2) that plaintiff was then and there employed by third-party defendant and working as a longshoreman in discharging the cargo pursuant to the contract; and (3) that if at the time of any injury to plaintiff, the ship was in anywise unseaworthy or if the place where plaintiff was working was in an "unsafe and dangerous condition", such was caused or permitted to continue to exist "solely by reason of the acts of omission or commission of said third-party defendant, its agents, servants and employees."

Wherefore defendant shipowner as third-party plaintiff demanded judgment against third-party defendant stevedoring contractor "for all sums that may be adjudged in the first instance against defendant and in favor of plaintiff." [Fed.R.Civ.P. 14 (a).]

The stevedoring contractor-employer answered joining issue on the third-party complaint, and at pre-trial conference the parties stipulated that: plaintiff is a citizen of California; defendant and third-party plaintiff is a Norwegian corporation and the owner of M S Castleville; third-party defendant is a California corporation, and on April 19, 1955 was conducting stevedoring operations on board the M S Castleville for the shipowner pursuant to a written contract; while employed as a longshoreman by the stevedoring contractor and while working aboard the M S Castleville "moored in the navigable waters of the United States of America", plaintiff was injured on April 19, 1955; the stevedoring contractor-employer paid to plaintiff pursuant to the Longshoremen's and Harbor Workers' Compensation Act [33 U.S.C. §§901-950], but not "under an award in a compensation order" [*id.* §933(b)], the sum of $175 as compensation [*id.* §914(a)], and the sum of $306.65 for medical services and supplies, in accordance with the Act. [*Id.* §907.] It was conceded also that plaintiff had duly

elected, under §33(a) of the Act [33 U.S.C. §933(a)], to sue defendant shipowner. [See *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124, 127, 128, 144 (1956).]

At the trial plaintiff presented a stipulation signed by defendant shipowner, as follows: "That on April 19, 1955, the M S Castleville was unseaworthy due to insecure hatchboards at No. 1 hatch, and that as a result of said condition plaintiff did fall and sustain personal injuries" [*cf. Crumady v. The Joachim Hendrik Fisser*, 249 F.2d 818 (3d Cir. 1957), *cert. granted*, 357 U.S. 903 (1958); 27 U. S. L. Week 3197 (1/6/59)]; and "That plaintiff has been damaged in the sum of $2,000 exclusive of the benefits received by him under the . . . Act and provided to him by [the stevedoring contractor-employer] Metropolitan Stevedore Company."

With this stipulation, both plaintiff and defendant rested. Thereupon defendant shipowner, as third-party plaintiff, presented the testimony of plaintiff longshoreman and rested, and third-party defendant stevedore contractor presented testimony from its employee, the ship foreman or "boss" at the time of the accident, and rested.

From the facts as stipulated and the evidence thus adduced, it appears that at the time the cargo was loaded at a foreign port the "queen beam" belonging in the No. 1 *main* deck hatch was erroneously placed under the hatch boards on the forward section of No. 1 *'tween* deck hatch. Since the slots did not fit, this error caused the hatch boards on the forward section of No. 1 'tween deck hatch to wobble or seesaw and to be insecure, and to give way when plaintiff walked thereon in the performance of his duties. As a result plaintiff fell through the 'tween deck hatch into the hold below, sustaining injuries to his right hand and arm.

Prior to the accident, the contracting stevedore, through its ship foreman, became aware of the misplaced "queen beam" and the insecure hatch boards covering the forward section of No. 1 'tween deck hatch, ordered the stevedoring work halted, and complained of the condition to the ship's mate in charge. The mate made an inspection, told the stevedore's foreman that the wrong "queen beam" had been put in place at another port, and instructed the ship boss to clear the cargo of bales of sponge rubber from the hatch boards covering the forward section of No. 1 'tween deck hatch, then remove the hatch boards, substitute the proper "queen beam", and replace the hatch boards securely. Following

this inspection and authorization by the mate, the stevedore's foreman ordered the longshoremen to proceed accordingly.

The contract between the shipowner and the stevedoring company, as independent contractor, was received in evidence, and provides for "all loading and discharging of all cargo in vessels owned or operated by" the shipowner, the "handling of dunnage", and the "initial and final handling of hatch beams, hatchcovers . . . ", at agreed "Commodity Rates" covering all time, including "lost or standby time", spent by the stevedore company in doing the work, with compensation for "extra labor when authorized by ship's officers . . . ."

As was the case with all the stevedoring company's work under the contract with the shipowner, the mode and manner and method to be adopted in clearing the baled rubber cargo from the hatch boards were matters exclusively within the discretion of third-party defendant. [See *McGeehey v. Moran Towing Corp.*, 149 F. 2d 791, 793 (2d Cir. 1945).]

Unnecessarily, as the work proceeded, the stevedoring contractor's foreman required or permitted the longshoremen, including plaintiff, to walk upon and across the wobbly hatch boards covering the forward section of No. 1 'tween deck hatch. As a result, while plaintiff was engaged in helping with the work of clearing the hatch boards of cargo, one of the insecure hatch boards upon which he stepped gave way, permitting him to fall into the hold below, thereby sustaining permanent deforming injuries to one of the fingers of his right hand.

In electing an unsafe method of clearing the cargo from the hatch boards, third-party defendant stevedoring contractor was negligent, and such negligence, as well as the conceded unseaworthiness of the No. 1 'tween deck hatch, was a proximate cause of plaintiff's injuries. The evidence does not establish any negligence on the part of defendant shipowner, or any contributory negligence on the part of plaintiff longshoreman.

Defendant shipowner now advances two contentions: first, as to plaintiff's complaint, that the stevedore employer is not entitled to reimbursement for—hence plaintiff is not entitled to recover—the $481.65 paid to plaintiff as compensation and medical expense under the Longshoremen's and Harbor Workers' Compensation Act; and, second, as to the third-party complaint, that the ship-

owner is entitled to a judgment against the stevedoring contractor for the amount of any judgment awarded plaintiff.

The gist of the argument in support of defendant's first contention is that, since the stevedoring contractor-employer's negligence was one of the proximate causes of plaintiff's damage, the negligent employer should not be entitled to reimbursement at the shipowner's expense out of plaintiff's recovery from the shipowner.

That identical argument was advanced by the shipowner, and considered by the Court, in *Pope & Talbot, Inc. v. Hawn, supra*, 346 U.S. at 411-412. The Court there said: ". . . [The shipowner] Pope & Talbot says that if [the injured longshoreman] Hawn keeps the money [paid under the Act] he will have a double recovery and that to allow him to repay [his employer] Haenn would give an unconscionable reward to an employer whose negligence contributed to the injury. A weakness in this ingenious argument is that §33 of the Act has specific provisions to permit an employer to recoup his compensation payments out of any recovery from a third person negligently causing such injuries. Pope & Talbot's contention if accepted would frustrate this purpose to protect employers who are subjected to absolute liability by the Act. Moreover, reduction of Pope & Talbot's liability at the expense of Haenn would be the substantial equivalent of contribution which we declined to require in the *Halcyon* case [*Halcyon Lines v. Haenn Ship Corp.*, 342 U.S. 282 (1952)]." [346 U.S. at 412.]

If as between the negligent shipowner [346 U.S. at 408] and the negligent employer, there could be no ground for denying the latter reimbursement at the expense of the former [*Pope & Talbot, Inc. v. Hawn, supra*, 346 U.S. at 412], by parity of reasoning the same result should obtain where, as in the case at bar, the question as to who is principal and who is surety arises between a negligent employer liable to the longshoreman under the Act irrespective of fault and a non-negligent shipowner also liable irrespective of fault because of a breach of the implied warranty of seaworthiness. [33 U.S.C. §§914(a), 933(a); *cf. Chapman v. Hoage*, 296 U.S. 526, 529 (1936); see *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., supra*, 350 U.S. at 127, 128, 140.]

Although the opinions of the trial and appellate courts do not disclose it, an examination of the record in *Pope & Talbot, Inc.*

v. Hawn, supra, 346 U.S. at 406, reveals that there, as here, the injured longshoreman was paid compensation and furnished medical service by the employer without any formal award being made under the Act. [See: 99 F.Supp. 226 (E.D.Pa. 1951); 100 F. Supp. 338 (E.D.Pa. 1951); 198 F.2d 800 (3d Cir. 1952).]

It follows then that the employer at bar, having paid benefits under the Act without "an award in a compensation order" [*id.* §933(b); *cf. id.* §914(a)], is entitled to reimbursement out of the employee's recovery, and to that end is to be subrogated *pro tanto* to the rights of the employee against the "third person" to the extent of payments so made. [*The Etna,* 138 F.2d 37 (3rd Cir. 1943); *cf. Chapman v. Hoage, supra,* 296 U.S. at 529.] Accordingly, third-party defendant employer is entitled to reimbursement to the extent of $481.65 out of the judgment for $2,481.51 to be awarded plaintiff longshoreman upon his complaint against defendant shipowner. [Fed.R.Civ.P. 54(c); *cf. The Etna, supra,* 138 F.2d at 41-42.]

Turning now to the third-party complaint for "indemnity" [*cf. Pope & Talbot, Inc. v. Hawn, supra,* 346 U.S. at 408], although the pleading as drawn sounds in tort, it appears settled that the shipowner cannot recover over against the stevedoring contractor upon any tort theory. [*Weyerhaeuser S.S. Co. v. Nacirema Co.,* 355 U.S. 563, 569 (1958); *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.,* 350 U.S. 124, 128-132 (1956); *Halcyon Lines v. Haenn Ship Corp., supra,* 342 U.S. at 285-286; *Considine v. Black Diamond S.S. Corp.,* 163 F.Supp. 109 (D.Mass. 1958); 33 U.S.C. §905.]

While the shipowner's liability to the individual longshoreman may be said to be predicated upon principles of tort liability [*cf. Strika v. Netherlands Ministry of Traffic,* 185 F.2d 555, 558 (2d Cir. 1950), *cert. denied,* 341 U.S. 904 (1951)], the authorities hold that the shipowner's so-called right to indemnity, absent express provisions of contract [*A/S J. Ludwig Mowinckels Rederi v. Commercial Stevedoring Co.,* 256 F.2d 227 (3d Cir. 1958)], is nothing more or less than a right to recover damages for breach by the stevedoring company of an implied-in-fact obligation of the stevedoring contract. [*Weyerhaeuser S.S. Co. v. Nacirema Co., supra,* 355 U.S. at 567 n.5; *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., supra,* 350 U.S. at 132-135.]

Mr. Justice Burton declared for the Court in *Ryan* that: "The shipowner's action is not changed from one for a breach of contract to one for a tort simply because recovery may turn upon the standard of the performance of . . . stevedoring service." [350 U.S. at 134.]

And Mr. Justice Clark pointed out in *Nacirema* that "in the area of contractual indemnity an application of the theories of 'active' or 'passive' as well as 'primary' or 'secondary' negligence is inappropriate." [355 U.S. at 569; and see *Revel v. American Export Lines*, 162 F.Supp. 279, 286 (E.D.Va. 1958).]

While the express words of the contract between the shipowner and the contracting stevedore at bar do no more than obligate the latter to "perform all loading and discharging of all cargo", it was held in *Ryan* that such an agreement necessarily includes the implied-in-fact obligation to load and discharge cargo "properly and safely". "Competency and safety", the Court pointed out, "are inescapable elements of the service undertaken." Hence this obligation "is not a quasi-contractual obligation implied in law or arising out of a non-contractual relationship. It is of the essence of . . . [the] stevedoring contract." [350 U.S. at 133.]

Thus the obligation is one implied in fact, and not in law, and the content of this implied-in-fact obligation on the part of the stevedoring contractor is to perform the stevedoring service for his customer, the shipowner, in a workmanlike manner and with reasonable safety to persons and property. [*Weyerhaeuser S.S. Co. v. Nacirema Co., supra*, 355 U.S. at 565; *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., supra*, 350 U.S. at 134.] Also to pay to the shipowner all "foreseeable damages resulting to the shipowner from the contractor's improper performance." [350 U.S. at 129, n.3; *cf. Reddick v. McAllister Lighterage Line*, 258 F.2d 297 (2d Cir. 1958); *cert. denied*, 27 U.S.L.Week 3176 (U.S. Dec. 9, 1958) (No. 462).]

The stevedoring company's implied-in-fact contractual obligation to perform its duties with reasonable safety embraces not only the handling of cargo, but "the use of the equipment incidental thereto" as well. [355 U.S. at 567.] It includes also the duty to suspend the loading or unloading operations on its own initiative, and thus to avoid injury or damage, whenever the stevedore realizes that it would be unsafe under the circumstances to proceed.

[*United States v. Arrow Stevedoring Co.*, 175 F.2d 329 (9th Cir. 1949), *cert. denied*, 338 U.S. 904 (1949); *The Adah*, 258 Fed. 377, 380 (2d Cir. 1919); *The Robert R.*, 255 Fed. 37, 39 (2d Cir. 1918); *Smith v. Nicholson Transit Co.*, 39 F.Supp. 795, 797 (W.D.N.Y. 1941).] So if the stevedoring contractor renders a substandard performance which foreseeingly leads to the shipowner's liability to a longshoreman, the shipowner would be "entitled to indemnity absent conduct on its part sufficient to preclude recovery." [*Weyerhaeuser S.S. Co. v. Nacirema Co., supra*, 355 U.S. at 567.]

That is to say, if the stevedoring contractor commits a material breach of its contractual obligation to the shipowner and such breach is a proximate cause of damage to the shipowner, then the stevedoring contractor would be liable for breach of contract to the extent of such damage, unless the shipowner has been guilty of a material breach of the contract. [*Cf. Oleszcuk v. Calmar S.S. Corp.*, 164 F.Supp. 628, 633 (D.Md. 1958).]

Here it is clear from the facts found that third-party defendant stevedoring contractor breached its implied-in-fact contractual obligation to discharge the cargo in a workmanlike manner and with reasonable safety to persons and property, and that such breach was a proximate cause of plaintiff's injuries and the resulting recovery from and damage to the shipowner. Hence the shipowner is entitled to recover "indemnity" from the stevedoring contractor—reparation in the form of damages for the breach of contract—provided the shipowner fully performed its material obligations under the contract. [Restatement, Contracts §397 (1932).]

Defendant shipowner admits owing an implied warranty of seaworthiness to plaintiff longshoreman, and a breach of that warranty "due to insecure hatch boards at No. 1 hatch"; also that such breach was one of the proximate causes of plaintiff's injuries. But the shipowner asserts that this unseaworthy condition did not constitute a breach of any obligation owed by the shipowner to the stevedoring contractor.

The implied warranty of the shipowner as to seaworthiness, first raised by law in favor of the shipper of cargo [*The Caledonia*, 157 U.S. 124, 130 (1895)], later extended to seamen [*The Osceola*, 189 U.S. 158 (1903)], and still later to longshoremen [*Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 89-94 (1946)], does not extend

to the stevedoring contractor. Those considerations of reason and policy which prompted extension of the benefit of the warranty to the individual longshoreman, absent any contractual relationship, do not exist with respect to his employer, the contracting stevedore. [*Cf. Kermarec v. Compagnie Generale Transatlantique*, 245 F.2d 475 (2d Cir. 1957), *cert. granted*, 355 U.S. 902 (1957); 27 U.S.L.Week 3166 (U.S. Dec. 2, 1958) (No. 22).]

The stevedoring contractor represents himself to be, and is assumed to be, expert and experienced in the work of loading and unloading cargo, while the individual longshoreman may or may not be. Moreover, since predicated upon principles of tort liability rather than contract, the obligations imposed by law upon the shipowner in favor of an individual longshoreman coming aboard ship to work in loading or unloading the cargo are quite different from the obligations of the shipowner in favor of the longshoreman's employer arising from the stevedoring contract. It is necessary, then, to look to the stevedoring contract to learn what obligations are there imposed upon the shipowner—not by law, but by contract—in favor of the stevedore employer.

Where, as here, the terms of the stevedoring contract do not expressly impose upon the shipowner any material obligation beyond that of payment to cover the stevedoring service, all additional contractual obligations on the part of the shipowner must, as with the stevedores in *Ryan* and *Nacirema*, be implied in fact from the inferences necessarily arising out of the circumstances surrounding the contract and its performance. [*Cf.* Weinstock, The Employer's Duty to Indemnify Shipowners for Damages Recovered by Harbor Workers, 103 U. of Pa. L. Rev. 321, 342-346 (1954).]

The stevedoring agreement is a maritime contract [*Atlantic Transport Co. v. Imbrovek*, 234 U.S. 52, 61-62 (1914)], so any obligations to be implied as in fact arising from the contract should take cognizance of the maritime considerations involved. Ships, as well as seamen and longshoremen, are subject to the "hazards of maritime service." Ships still break up at sea. Even though the ships of today may not be as vulnerable, the typhoons of our day are as "formidable and swift" as when Conrad wrote. The Pacific Coast is as treacherous now as it was some two generations ago when the Nottingham was battered into a hulk off the Oregon coast. [*The Nottingham*, 236 Fed. 618 (9th Cir. 1916).]

In almost every instance, when a stevedoring contractor commences the work of loading or unloading a seagoing vessel, the ship has arrived in port only a few hours before. She may have been at sea for weeks or months. Almost always, she has ridden some heavy seas. Often she may have rolled and pitched through mountainous seas for days, taken thousands of tons of water over her decks, sailed through freezing and tropical weather, and been beaten by 100 mile an hour gales. Almost surely she will have been serviced by stevedores of varying degrees of competency in other parts throughout the world.

Being a mass of plates, pipes, wires, beams and various mechanisms, each to some degree vulnerable to the elements, it would be much too much to expect a cargo vessel to arrive in port with all equipment, appliances and facilities in a fully seaworthy condition. Especially is this true with respect to the hatches, booms and winches, which are relatively more likely to be in disorder because of the elements, and the abuse and misuse of men as well. It is reasonable to expect, then, that many things may be wrong with a freighter and her equipment and appliances when she arrives in port; that she may well be a place of danger even as she docks. And all of these lurking dangers may be due entirely to the hazards of the ship's service.

The stevedoring contractor knows that the ship has been at sea; that she may be in many respects dangerous to the life and limb of an unskilled person; that if a condition is found which is unsafe for the professional longshoreman, as a rule the contractor can remedy it at the expense of the shipowner; that if the stevedoring operations are thereby delayed, the shipowner normally must pay for standby time.

Stevedoring contractors hold themselves out as being trained and equipped to cope with these conditions and these dangers. To this end, the stevedoring contractor is usually given full use and charge of the ship's loading and unloading equipment and appliances and the cargo hatches and holds. So it is that the stevedoring contractor cannot reasonably expect, and does not expect, to board a vessel which in all respects, as to equipment and appliances as well as hull, is in a seaworthy condition, or even in a reasonably safe condition. Hence it is not reasonable to infer that the shipowner, in executing the stevedoring contract, impliedly covenants that the condition of the ship or of her equip-

ment or appliances will exceed the stevedoring contractor's reasonable expectations.

This is not to suggest that the surrounding circumstances are such as to require the contract to be so construed that the stevedoring contractor boards the vessel wholly at peril. To the contrary, with the shipowner, as with the stevedore, certain obligations are to be implied in fact as being of the essence of the stevedoring contract. [*Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., supra,* 350 U.S. at 133.]

Although admonished in *Ryan* that resort may not be had to principles of quasi-contract or to the law of torts to ascertain the obligations of the shipowner vis-a-vis the stevedoring contractor, it is helpful in considering the surrounding circumstances of fact and law, in the light of which the stevedoring contract was made, to recall the long-settled rule that the shipowner owes a duty of ordinary care imposed by law toward "persons rightfully transacting business on ships . . ." [*Pope & Talbot, Inc. v. Hawn, supra,* 346 U.S. at 413, n.6; and see *e.g.*: *The Max Morris,* 137 U.S. 13 (1890); *Leathers v. Blessing,* 105 U.S. 626 (1882); *Tidewater Associated Oil Co. v. Richardson,* 169 F.2d 802 (9th Cir. 1948).]

The surrounding circumstances of fact, and that of law just recited, prompt the holding that, absent express provision to the contrary, the shipowner owes to the stevedoring contractor under the stevedoring contract the implied-in-fact obligations: (1) to exercise ordinary care under the circumstances to place the ship on which the stevedoring work is to be done, and the equipment and appliances aboard ship, in such condition that an expert and experienced stevedoring contractor, mindful of the dangers he should reasonably expect to encounter, arising from the hazards of the ship's service or otherwise, will be able by the exercise of ordinary care under the circumstances to load or discharge the cargo, as the case may be, in a workmanlike manner and with reasonable safety to persons and property; and (2) to give the stevedoring contractor reasonable warning of the existence of any latent or hidden danger which has not been remedied and is not usually encountered or reasonably to be expected by an expert and experienced stevedore in the performance of the stevedoring work aboard the ship, if the shipowner actually knows or, in the exercise of ordinary care under the circumstances, should know of

the existence of such danger, and the danger is one which the shipowner should reasonably expect a stevedore to encounter in the performance of the stevedoring contract. [*Cf.*: ***Parenzan v. Iino K.K.K.***, 251 F.2d 928 (2d Cir. 1958), *cert. denied*, 356 U.S. 939 (1958); ***American S.S. Co. v. Copp***, 245 F.2d 291 (9th Cir. 1957); ***United States v. Harrison***, 245 F.2d 911 (9th Cir. 1957); ***Southport Transit Company v. Avondale Marine Ways***, 234 F.2d 947, 951 (5th Cir. 1956); ***American President Lines v. Marine Terminals Corp.***, 234 F.2d 753 (9th Cir. 1956), *cert. denied*, 352 U.S. 926 (1956); ***Berti v. Compagnie de Navigation Cyprien Fabre***, 213 F.2d 397 (2d Cir. 1954); ***Crawford v. Pope & Talbot, Inc.***, 206 F.2d 784, 792 (3d Cir. 1953); ***Slattery v. Marra Bros.***, 186 F.2d 134, 139 (2d Cir. 1951); ***United States v. Rothschild Int. Stevedoring Co.***, 183 F.2d 181 (9th Cir. 1950); ***American Mut. Liability Ins. Co. v. Matthews***, 182 F.2d 322 (2d Cir. 1950); ***United States v. Arrow Stevedoring Co.***, *supra*, 175 F.2d at 331; ***Calanchini v. Bliss***, 88 F.2d 82 (9th Cir. 1937); ***Cornec v. Baltimore & O. R. Co.***, 48 F.2d 497, 502 (4th Cir. 1931), *cert. denied*, 284 U.S. 621 (1931); ***Seaboard Stevedoring Co. v. Sagadahoc S.S. Corp.***, 32 F.2d 886 (9th Cir. 1929); ***Bethlehem Shipbuilding Corp. v. Joseph Gutradt Co.***, 10 F.2d 769, 771 (9th Cir. 1926); 2 Restatement, Torts §§360, 332, comment h (1934); 2 Harper & James, The Law of Torts, §27.17 (1956).]

The evidence is not such as to warrant a finding that the shipowner here breached either of these implied-in-fact obligations of the stevedoring contract in any respect. On the contrary, the evidence establishes full performance by the shipowner. [*Cf. American Mut. Liability Ins. Co. v. Matthews*, *supra*, 182 F.2d at 324.]

Of course, as third-party defendant points out, there is a third implied-in-fact obligation on the part of the shipowner not unreasonably or materially to hinder, delay or interfere with performance of the stevedoring operations. [Restatement, Contracts §§295, 315 (1932); 4 Corbin, Contracts §947 (1951).] However, there is no evidence of any unreasonable or material prevention of performance on the part of the shipowner in the case at bar. The contract expressly provides that the stevedoring contractor is to be paid on a time basis for service of every kind, including the repair of defects in hatches or other ship appliances and equipment, and that the contractor is to be paid also for standby time

due to any delay in the stevedoring operations caused by the shipowner.

Accordingly, the finding must be that the shipowner at bar did not breach, but fully performed, both its express and implied-in-fact obligations to the stevedoring contractor under the contract.

Furthermore, if it were assumed arguendo that the misplaced "queen beam" was a breach by the shipowner, the stevedoring contractor was fully aware of this latent condition prior to plaintiff's injury and nonetheless willingly proceeded with the work despite the known dangerous condition, and hence would be held to have waived the breach. [Restatement, Contracts §§297, 294 (1932); see *American President Lines v. Marine Terminals Corp.*, *supra*, 234 F.2d at 759; *cf. Ryan Stevedoring Co. v. Pan-Atlantic S.S. Co.*, *supra*, 350 U.S. at 134-135.]

Finally, third-party defendant urges that the shipowner cannot recover damages on the third-party plaintiff's claim for breach of the stevedoring contract because, the argument goes, the shipowner was a volunteer who needlessly admitted liability and damage and so, in effect, voluntarily settled with plaintiff without contesting liability. The argument is wholly without merit. The shipowner was unquestionably liable to the longshoremen for a plain breach of the implied warranty of seaworthiness. [*Grillea v. United States*, 232 F.2d 919, 922 (2d Cir. 1956).] The nature and extent of the resulting damage was equally beyond dispute. The facts as to liability and damage being incontrovertible [*cf. Albina Engine & Machine Works, Inc. v. American Mail Line, Ltd.*, ___ F.2d ___ at n. 1 (9th Cir. 1/2/59)] the shipowner is not to be branded a volunteer for conceding them. [*Ace Tractor & Equipment Co. v. Olympic S.S. Co.*, 227 F.2d 274, 276 (9th Cir. 1955).] In any event, third-party defendant was in no wise prejudiced. [*Cf. Chapman v. Hoege*, *supra*, 296 U.S. at 529-532.]

For the reasons stated I find that third-party plaintiff shipowner performed its obligations to the stevedoring company under the contract; that third-party defendant stevedoring company, acting through its employees, breached its implied-in-fact contractual obligation to discharge the cargo in a workmanlike manner and with reasonable safety to persons and property; and that such breach by the stevedore was a proximate cause of the injury suffered by plaintiff.

As a result of this breach, the shipowner became liable to plaintiff longshoreman for $2,481.65 and costs of suit. Reparation to the extent of that loss to the shipowner is the measure of the shipowner's damages for the stevedoring contractor's breach. [Restatement, Contracts §330 (1932); 5 Corbin, Contracts §§1006, 1007 (1951); 5 Williston, Contracts §1356 (Rev. ed. 1937); *Mowbray v. Merryweather*, 2 Q.B. 640 (1895).]

What has been said may serve as findings of fact and conclusions of law [Fed.R.Civ.P. 52 (a)] upon which to predicate (1) judgment in favor of plaintiff longshoreman and against defendant shipowner on the complaint for $2,481.65 and costs, of which $481.65 is to be paid to third-party defendant employer as reimbursement for compensation and medical expense laid out for the account of plaintiff under the Longshoremen's and Harbor Workers' Compensation Act; and (2) judgment on the third-party complaint of the shipowner against third-party defendant stevedoring contractor for damages for breach of contract, in such sum as third-party plaintiff may be required to pay to or for the account of plaintiff in this action, namely, $2,481.65 and costs. Although the third-party complaint does not allege breach of contract as ground for "indemnity" or reparation, the case was tried and submitted for decision on the claim for damages for breach of contract. [Fed.R.Civ.P. 54(c); *cf. Ryan Stevedoring Co. v. Pan Atlantic S.S. Corp., supra*, 350 U.S. at 141; *Royal Mail Lines, Ltd. v. Peck and Associated-Banning Company*, ... F.2d ..... (9th Cir. 11/13/58).]

Judgment will be entered accordingly.

Filed, Nunc Pro Tunc, Dec. 31, 1958, Jan. 21, 1959.

Clerk, U. S. District Court,
Southern District of California,
By .....
Deputy Clerk.

Appendix B

United States Court of Appeals
for the Ninth Circuit

Metropolitan Stevedore Company, a Corporation,	Appellant,	No. 16,399
vs.		Jan. 11, 1960
Dampskisaktieselskabet International, a Corporation,	Appellee.	

Appeal from the United States District Court for the
Southern District of California,
Central Division.

Before: Stephens, Barnes and Merrill, Circuit Judges.

Per Curiam:

We are satisfied in this matter that the exhaustive opinion of the trial judge, supported by the subsequent majority opinion in *Crumady v. The J. H. Fisser*, 1959, 358 U.S. 423, correctly decides the issues involved herein.

We therefore refer to and adopt the recited facts and the conclusions of that court. *Huges v. Dampskisaktieselskabet International*, S.D.Cal., 1959, 170 F.Supp. 601.

Appellant first differs with the trial court's conclusions by urging that a more extensive duty is owed to the stevedoring company by the ship than that found due by the trial court. The cases cited to support such a theory, however, are primarily cases dealing with active versus passive negligence determined prior to the Supreme Court cases establishing the contract theory of liability, rather than one arising in tort. *Crumady v. The J. H. Fisser, supra; Weyerhaeuser S.S. Co. v. Nacirema Co.*, 1958, 355 U.S. 563; *Ryan Co. v. Pan-Atlantic Corp.*, 1956, 350 U.S. 124. Further, the policy considerations discussed by the court below seem valid—(a) the possibility, or even probability, of unseaworthiness after long voyages, and (b) the expertise of the stevedoring company and its employees.

Appellant's second contention is that it did not waive the shipowner's breach of seaworthiness. In view of our decision on appellant's first point, we need not consider this. We point out, how-

ever, that this factual issue depends upon the court's conclusion as to whether the stevedoring company continued to unload as it had before the temporary halt in operation. There was no change in procedures used, and no attempt to avoid the danger by the use of another method. The evidence fully supports the finding of waiver, were it necessary.

Appellant next contends that there was no finding of negligence on its part, and had there been such, the evidence would not have sustained it. There was no express finding of negligence, but the third conclusion of law (Tr. 20), reads as follows:

> "3. Third-party defendant failed to perform its obligation under the stevedoring contract to discharge the cargo in a workmanlike manner and with reasonable safety to persons and property."

This finding covers the gap asserted by appellant, and is more germane to the issues of this, a contract case, than a finding of negligence would be. The inference of negligence is readily drawn from the evidence. Metropolitan's own foreman testified that there were alternative methods of discharging the same cargo which would not entail use of the loose hatchboards. That the work was carried out in this knowingly dangerous fashion would seem sufficient to support the breach of duty found by the trial judge.

Metropolitan next contends that appellee was a volunteer in paying Hugev for his injuries, and since the payment was not necessary, no action for indemnity will lie. Appellant cites cases for the proposition that an injury incurred by a worker attempting to repair an unseaworthy condition is not covered by the warranty of unseaworthiness. Whether such proposition would apply to work traditionally done by members of the crew (*cf., United Pilots Assn. v. Halecki*, 1959, 358 U.S. 613), we need not decide. It would require characterization of the activities of Metropolitan in continuing to unload as merely an attempt to repair the unseaworthy condition resulting from the use of the wrong queen-beam. The trial judge did not so find. He dismissed this argument as being wholly without merit. While the bales of rubber had to be removed in order to repair the condition, no change in mode of operation was commenced which would indicate that the removal of bales by Metropolitan was other than a continuation of the unloading operation.

The judgment is *affirmed*.

(Endorsed:) Per Curiam Opinion. Filed Jan. 11, 1960.
Frank H. Schmid, Clerk.

United States Court of Appeals
for the Ninth Circuit

Metropolitan Stevedore Company, a Corporation, Appellant, vs. Dampskisaktieselskabet International, a Corporation, Appellee.	No: 16,399

Appeal from the United States District Court for the Southern District of California,, Central Division

JUDGMENT

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered January 11, 1960.